Supreme Court, U.S.
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88-257
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF JACOBSEN, Debtor

CASEY RZEPKA,

Petitioner,

vs.

GARY JACOBSEN,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 11, 1988

June 8, 1988

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

IN THE MATTER OF JACOBSEN
Debtor

CASEY RZEPKA
Plaintiff-Appellant,

No. 87-2237 v.

GARY E. JACOBSEN
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 3071—**James B. Moran,** *Judge.*

ORDER

Casey Rzepka, a trade creditor of the bankrupt, Gary Jacobsen, appeals from the district court judgment affirm-

ing the bankruptcy court's grant of discharge to Jacobsen. Rzepka's appeal centers on two primary claims. First, he asserts that in affirming the bankruptcy court the district court applied the wrong legal standard. Second, appellant contends that the bankruptcy court improperly determined that Jacobsen was entitled to discharge under the 11 U.S.C. § 727 discharge provision because Jacobsen "knowingly and fraudulently in or in connection with [his petition for bankruptcy] made a false oath or account." 11 U.S.C. § 727(a)(4)(A).

I

In determining whether the district court applied the correct legal standard our review is *de novo*. *See In re Kimzey*, 761 F.2d 421, 423 (7th Cir. 1985); *In the Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir. 1984). *See also Pullman-Standard v. Swint*, 456 U.S. 273, 287, 103 S. Ct. 1781, 1789 (1982). Our review of the bankruptcy court's determination that Jacobsen was entitled to a full discharge under 11 U.S.C. § 727 is more narrowly limited. *See Kimzey*, 761 F.2d at 423. Our court has stated that, in general terms, "the right to discharge is left to the sound discretion of the bankruptcy court, and that an appellate court will not interfere with the decision of a bankruptcy court to grant a discharge unless there is a 'gross abuse of discretion.' " *In re Suttles*, 819 F.2d 764, 766 (7th Cir. 1987) (citation omitted) (quoting *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984)).

In this case our inquiry with regard to the propriety of the bankruptcy court's grant of discharge will focus only on the question of whether appellee knowingly and fraudulently made a false oath or account in connection with his petition for bankruptcy. Questions pertaining to a debtor's knowing or reckless falsehoods are questions of fact. *See Carini v. Matera*, 592 F.2d 378, 380 (7th Cir. 1979); *In re Nelson*, 561 F.2d 1342, 1347 (7th Cir. 1976). FED. R. BANKR. P. 8013 (1987) explicitly states:

> On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Like the district court, our review of factual findings of the bankruptcy court is also limited to the clearly erroneous standard. *Evanston Motor Co., Inc.*, 735 F.2d at 1031; *Kimzey*, 761 F.2d at 423. *See also In the Matter of Neis*, 723 F.2d 584, 589 (7th Cir. 1983); *In re Land Investors, Inc.*, 544 F.2d 925, 933 (7th Cir. 1976).

II

Appellant believes that the district court's conclusion that the bankruptcy court had determined that "the debtor, while incredibly sloppy, was not intentionally lying in his statement" demonstrates that in reviewing the bankruptcy court's grant of discharge to Jacobsen, the district court interpreted § 727(a)(4)(A) improperly. He submits that the district court read § 727(a)(4)(A) to require that a debtor make an intentional false oath or account in order for a denial of discharge to be warranted.

The portion of 11 U.S.C. § 727(a) relevant to this appeal states that "[t]he court shall grant the debtor a discharge unless—. . . (4) the debtor knowingly and fraudulently, in or in connection with the case—(A) made a false oath or account." The language of § 727(a)(4)(A) is unambiguous. It clearly requires that for a debtor to be denied discharge he must have made a statement under oath which he knew was false and he must have made that statement with an intent to defraud. *See Williamson v. Fireman's Fund Insurance Company*, 828 F.2d 249, 251 (4th Cir. 1987). *See also In the Matter of Melnick*, 360 F.2d 918, 920 (2d Cir. 1966) ("The words of the statute requiring that the testimony be given 'knowingly and fraudulent-

ly' mean no more than 'an intentional untruth in a matter material to the issue which is itself material.' ") (quoting *Troeder v. Lorsch*, 150 F.2d 710, 713 (1st Cir. 1906)); *In the Matter of Kaufhold*, 256 F.2d 181, 185 (3d Cir. 1958) (in order for discharge to be denied "it is sufficient that the bankrupt knows what is true and, so knowing, wilfully and intentionally swears to what is false"). It also well established that the § 727(a)(4)(A) ground for denial of discharge is satisfied where the debtor makes a false oath or account material to his case with reckless indifference to the facts. *See Morimura Aria & Co. v. Taback*, 279 U.S. 24, 33, 49 S. Ct. 212, 215 (1929) (either actual knowledge that a statement was incorrect, or reckless indifference to the available facts, was sufficient grounds to deny discharge to a debtor under a predecessor provision to § 727(a)(4)(A)); *See also Diorio v. Kreisler-Borg Construction*, 407 F.2d 1330, 1331 (2d Cir. 1969) (holding, in a case involving a creditor's objections to a discharge, that reckless indifference to the truth is the equivalent of fraud).

When the district court's order affirming the bankruptcy court is read in its entirety there can be no doubt that it relied upon the proper § 727(a)(4)(A) standard in reviewing the bankruptcy court's grant of discharge. The district court opinion identifies the "knowingly and fraudulently" state of mind requirement established by § 727(a)(4)(A) for denial of discharge and then measures the bankruptcy court's determination that Jacobsen was entitled to discharge against that requirement. It concludes: "this court is confident that the bankruptcy court in fact found that Jacobsen's protestations of inadvertence, rather than fraudulent or reckless conduct were true." The subsequent paraphrase in the district court opinion of the bankruptcy court's conclusion that appellee while "incredibly sloppy, was not intentionally lying in his statement" does not establish that the district court applied the wrong standard for determining if the bankruptcy court had properly granted Jacobsen discharge. Rzepka's claim that the district court so erred is rejected.

III

Rzepka's claim that a denial of discharge under § 727 (a)(4)(A) was warranted in Jacobsen's case turns on appellee's concededly false statements in answering three of the questions on the Statement of Financial Affairs (SFA) form. First, Jacobsen failed to list nine defunct bank accounts in his name or the name of one or more of the several firms he owned and operated. None of those accounts was active on the March 4, 1986 date of appellee's original SFA and none had any monies in them after November, 1985. Appellant next points to Jacobsen's failure to report a $649.12 federal income tax refund he received in 1984 and two state income tax refunds he received in 1984 and 1985 that totaled $324.74. Finally, Jacobsen failed to list on his SFA the name of Todd's Hardware Supply Company, a corporation he operated in conjunction with one of his primary enterprises, Jacobsen Building Maintenance. Todd's Hardware Supply Company was not an independent firm. It was used solely as a vehicle to enable Jacobsen Building Maintenance to obtain supplies at wholesale cost.

The bankruptcy court was presented with all the evidence pertaining to these three omissions made by Jacobsen in filling out the SFA. It heard Jacobsen testify that his acts of omission were inadvertent and unintentional. The bankruptcy court believed Jacobsen and concluded that although he did make statements that were both false and material, discharge was still warranted under § 727. As the district court observed, the bankruptcy court's findings of fact with regard to Jacobsen's material false statements were "not particularly artful." Nevertheless, it is apparent the bankruptcy court concluded that appellant did not knowingly and fraudulently make a false oath or account. That finding of fact was not clearly erroneous. Therefore, it must be affirmed.

IV

The district court applied the correct legal standard in reviewing the decision of the bankruptcy court. The bankruptcy court's finding of fact that Jacobsen did not knowingly or fraudulently make a false oath or account was not clearly erroneous. Accordingly, the judgment of the district court is AFFIRMED.[1]

FOOTNOTE

[1] In his initial brief, counsel for appellant cited to an article in the December 9, 1986 issue of the Chicago Daily Law Bulletin and a second article in the July 1, 1987 issue of the American Bar Journal. In response to a question from the bench at oral argument, counsel acknowledged that neither of these periodical articles was a part of the record before the district court. Counsel's action in effectively incorporating the articles into the record on appeal by reference to them in his brief is in direct contravention of FED. R. APP. P. 10(a) and our, parallel, 7th Cir. R. 10.

FED. R. APP. P. 10(a) specifies the materials that are properly included in the record on appeal. It states: "[T]he original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases." Under this definition "only those matters that were in fact presented to the district court are considered part of the record on appeal." Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*: Jurisdiction § 3956 (1977). Our court has previously held that "[t]he parties may rely on appeal only on materials furnished to the district judge." *Henn v. National Geographic Society*, 819 F.2d 824, 831 (7th Cir. 1987). *See also Tamari v. Bache & Company*, No. 87-1388, slip op. at 5 (7th Cir. January 20, 1988); *Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Company*, 833 F.2d 633, 636 (7th Cir. 1987). We strongly rebuke appellant's counsel for his blatant abridgement of Rule 10(a) and admonish him to avoid similar transgressions in the future.

At pages 42-43 of the appellant's brief there is an *unsubstantiated* suggestion that the bankruptcy judge engaged in some sort of impropriety in making his ruling. When counsel was asked about this suggestion at oral argument, he could provide no further basis for his oblique allegation. Such conduct on the part of counsel is totally unacceptable.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE
CASE NUMBER 87 C 3071

CASEY RZEPKA

v.

GARY E. JACOBSEN

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the decision of the bankruptcy judge is affirmed. (See Memorandum and Order dated July 7, 1987)

Date July 7, 1987

/s/ H. STUART CUNNINGHAM
Clerk

/s/ WILLIE A. HAYNES
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASEY RZEPKA,

Plaintiff,

No. 87 C 3071 vs.

GARY E. JACOBSEN,

Defendant.

MEMORANDUM AND ORDER

A trade creditor appeals the decision of the bankruptcy judge discharging the debtor in bankruptcy. The decision of the bankruptcy judge is affirmed.

There is very little in this case, factually or legally, which is in dispute. The debtor, who was in the building maintenance and rehabilitation business, filed a schedule of debts and property which represented that his total secured debts were more than his total property. There were, in addition, almost $200,000 in unsecured claims. No one is attacking the substantial accuracy of the filings of debts and assets. He also filed a statement of financial affairs for a debtor engaged in business. This statement was false in material respects. The debtor listed five bank accounts as those which he had maintained within the two years immediately preceding the bankruptcy petition. After the trustee raised a question about the accuracy of that representation, apparently on the basis of records turned over by the debtor to the trustee, the debtor listed seven more bank accounts. The creditor here thereafter turned up nine more bank accounts. The debtor failed to list a business carried on under the name "Todd's Hardware Supply Co." He stated that he had not received any tax refunds during the two years immediately preceding

the filing of the bankruptcy petition. In fact, he had received a federal tax refund of $649.12 and a state tax refund of $324.74. He denied that there was an incorporated entity, when, in fact, there was. 11 U.S.C. §727(a) provides that debtor not be discharged if he knowingly and fraudulently, in or in connection with the case, makes a false oath or account.

The bank accounts which were not disclosed did not contain any assets at the time of the bankruptcy. The undisclosed business did not independently hold any assets. The tax refunds were, in the context of over a million dollars in liabilities, nominal and the proceeds had long since been dissipated. The operating entity was in substance disclosed. Nevertheless, the creditor contends, and we believe quite correctly, that a false oath regarding worthless assets does constitute a material omission.

The appeal flounders, however, on the issue of debtor's intent. The statute prohibits discharge when the debtor knowingly and fraudulently states a false oath or account, and the law equates reckless indifference to the truth with fraud. However, the bankruptcy court, having the benefit of the testimony of the debtor and his explanations, found that the debtor's conduct did not rise (or, perhaps, more accurately, fall) to that standard. The bankruptcy judge's findings were not particularly artful, as they referred to Jacobsen as not a "dishonest man." The creditor quite rightfully points out that the debtor's general character is not the matter in issue. However, in context, this court is confident that the bankruptcy court in fact found that Jacobsen's protestations of inadvertence, rather than fraudulent or reckless conduct, were true. Bankruptcy Rule 8013 provides that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. The bankruptcy court did judge the credibility of the debtor here and, while the record amply demonstrates false material statements, this court cannot conclude that the bankruptcy court was clearly erroneous in finding, in effect, that the debtor, while

incredibly sloppy, was not intentionally lying in his statement. A perception of the mental state of an individual is one particularly dependent upon perceptions of credibility. It is, therefore, accorded great deference upon review. While this court might perhaps have reached a different conclusion, the conclusion reached by the bankruptcy court was not clearly erroneous.

The court does note that the creditor's counsel submitted memoranda in a somewhat unconventional form. This court found them particularly easy to follow and commends counsel for the manner of presentation.

/s/ JAMES B. MORAN
Judge,
United States District Court

July 7, 1987.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
(EASTERN DIVISION)

No. 86 A 812
(85 B 15349)

JUDGMENT
ON DECISION
BY THE COURT

CASEY RZEPKA v. GARY E. JACOBSEN
Plaintiff *Defendant*

This proceeding having come on for trial or hearing before the court, Honorable THOMAS JAMES, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

It is Ordered and Adjudged that Objection to discharge is overruled. Judgment is entered in favor of defendant.

/s/ WAYNE E. NELSON
Clerk of Bankruptcy Court

[Seal of the U.S. Bankruptcy Court]
Date of issuance: 2-12-87

By: /s/ SHEILA ANDERSON
Deputy Clerk

IN THE
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of:	)	No. 85 B 15349
	)	No. 86 A 812
CASEY RZEPKA	)	Judge James
	)	
vs.	)	February 12, 1987
	)	11:00 a.m.
GARY E. JACOBSEN.	)	

PROCEEDINGS BEFORE
THE HONORABLE THOMAS JAMES

APPEARANCES:

MR. STEVEN B. LEVITT
appeared on behalf of the Debtor;

MR. BENJAMIN MYERS
appeared on behalf of the Plaintiff.

THE COURT: All during your arguments, gentlemen, and I appreciate your arguments but for the personal cast you give to—

It is not necessary, so don't do that.

I have been concerned about the problems that I hope that I have spoken to both—to you, Mr. Myers, and Mr. Levit—and I have been concentrating on the matter of Hussan, H-u-s-s-a-n, the case found in 56 BR 288 which makes some general statements of the law, trying to figure out just what these statements mean.

And I would call the parties' attention to page 290 where near the bottom of the first column the bankruptcy judge states: "To sustain an objection to discharge pursuant to section 727(A)(4)(a), the trustee or the creditor—" as in this case—"must establish that the debtor knowingly made a false statement under oath with the intent to defraud his creditors regarding a matter material to the administration of his estate. Cases cited".

There is no doubt that the answers to the various questions which have been admitted to have been, in the Court's words "false," regard matter material to the administration of the estate.

I am concerned about the statement in this case that says "the debtor knowingly." I look on—further on in this paragraph in the second—the right-hand column on page 90 where it says, "The subject matter of a false oath is material and thus sufficient to bar discharge if it bears a relationship to the debtor's business transactions or estate or concerns the discovery of assets, business dealings, or the existence and disposition of his property."

I am trying to equate or find out what that particular statement means as to the debtor knowingly making a false statement under oath.

It is difficult for this Court, under the facts that has been submitted to it, knowing the work, the fine work that this creditor did, to state that Gary E. Jacobsen knowingly made a false statement under oath unless the Court finds that such inattention was given to the preparation of the schedules and statement that the omissions that were made in the answers as shown by the amendments that were filed afterwards rise to such a extent to state that the debtor knowingly has done these various acts.

There has been no question that the debtor did, in fact, list all of his assets. The purpose of answering the statements in the—or the statements of the person filling out the statements is to give creditors an opportunity to make their own investigation, to make sure that every avenue to find out about the debtor's business affairs or personal affairs may be followed.

I cannot agree with the harshness of the Tabibian case. This Court is as much concerned about honesty and integrity of a debtor's filing. And I suppose what the answer is when we have a creditor who has undertaken to find out these facts as have been submitted to the Court through the proper investigation by Mr. Myers looking through records—and I will accept that statement even though we don't have any evidence other than his statement about that. And I smile because I don't like to consider lawyer's statements as evidence—

How do I protect these creditors to do that? But I cannot in good conscience say that Jacobsen is a dishonest man, and I suppose that is where it lies. He may be guilty of the grossest misconduct here in not taking care to fill out those questionaires, the statements of a person conducting business.

But I have no feeling, from having observed his testimony and accepting his statements, that he is the type of dishonest person who should not have a discharge. And I suppose that is where the answer will lie, Mr. Myers; and therefore the objections to the discharge will be overruled and Mr. Jacobsen will receive a discharge. Thank you very much.

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 1988

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

IN THE MATTER OF JACOBSEN
Debtor

CASEY RZEPKA,
Plaintiff-Appellant,

No. 87-2237 vs.

GARY E. JACOBSEN,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87-C-3071—**James B. Moran**, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.